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MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF -
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IT HAS LONG BEEN SETTLED THAT "THE RIGHT TO

COUNSEL IS THE RIGHT TO THE EFFECTIVE ASSISTANCE

OF COUNSEL." MC MANN V. RICHARDSON, 397 U.S. 759, 771, N.14, 90S.

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JAVOR V. UNITED STATES, 724 F.2d 831, 834 (CA9 1984) ("PREJUDICE

IS INHERENT IN THIS CASE BECAUSE UNCONSCIOUS OR SLEEPING

COUNSEL IS EQUIVALENT TO NO COUNSEL AT ALL").

INDEED, COUNSEL'S INCOMPETENCE CAN BE SO SERIOUS

THAT IT RISES TO THE LEVEL OF A CONSTRUCTIVE DENIAL

OF COUNSEL WHICH CAN CONSTITUTE CONSTITUTIONAL ERROR

WITHOUT ANY SHOWING OF PREJUDICE. SEE CRONIC, 466 U.S., AT

659-660, 104 S. CT, AT 2047. SEE CF., E.G. MOORE V. UNITED STATES, 432 F.2d 730, 736

(CA3 1970) ("DEFINING THE CONSTITUTIONALLY REQUIRED LEVEL OF PERFORMANCE

AS "THE EXERCISE OF THE CUSTOMARY SKILL AND KNOWLEDGE WHICH

NORMALLY PREVAILS AT THE TIME AND PLACE"). THUS AN INQUIRY INTO A

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SPECULATION." HOLLOWAY V. ARKANSAS, 435 U.S. 475, 490-491, 98 S. CT. 1173, 1181-1182, 55 L.ED.2d

426 (1978) (EMPHASIS IN ORIGINAL). IF THE DEFENDANT CAN ESTABLISH A SIGNIFICANT

CHANCE THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT, HE SURELY SHOULD BE

ENTITLED TO A REDETERMINATION OF HIS FATE. CF. UNITED STATES V. AGURS, 427

U.S. 97, 121-122, 96 S. CT. 2392, 2405-2406, 49 L.ED.2d 342 (1976) (MARSHALL J., DISSENTING.)

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MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF GROUND 6.- ABSENCE OF COUNSEL IN VIOLATION OF 14TH AMENDMENT DUE PROCESS + EQUAL PROTECTION CLAUSE, ~~6TH AMENDMENT DUE PROCESS + EQUAL PROTECTION CLAUSES, 14TH AMENDMENT DUE PROCESS + EQUAL PROTECTION CLAUSES, 6TH AMENDMENT DUE PROCESS + EQUAL PROTECTION CLAUSES, 14TH AMENDMENT DUE PROCESS + EQUAL PROTECTION CLAUSES~~ ARGUMENT.

SEE U.S. CRONIC (1984) 466 US 448, 104 S. CT. 2039, 90 L. ED. 2D 657

SEE ALSO PEOPLE V. ZAMMORA 66 CAL. APP. 2D 166, 234-37, 152 P. 2D 180,

211-15 (1944) (COUNSEL AND DEFENDANTS SEATED SEPARATELY, MAKING

CONSULTATION IMPOSSIBLE); STATE V KELLER, 57 N. D. 645, 223 N. W.

698, 64 A. L. R. 434 (1929) (COUNSEL INTOXICATED TO SUCH AN EXTENT

THAT HE DID NOT KNOW WHAT WAS TRANSPILING AT ALL TIMES

IN THE COURT ROOM). THE PREJUDICE INHERENT IN JAVOR'S COUNSEL'S

ACTION IS WELL ILLUSTRATED BY CONSIDERING THE ONGOING

CONSULTATION ORDINARILY REQUIRED IN THE COURSE OF A

CRIMINAL TRIAL. GENERALLY AN ATTORNEY AND CLIENT NEED TO CONFER

ABOUT THE TESTIMONY OR EVIDENCE ADDUCED AT TRIAL AND TOGETHER

EVALUATE IT'S IMPACT. CEDERS V. U. S. 425 U. S. AT 88, 96 S. CT AT 335. TODAY WE

CONCLUDE THAT WHEN AN ATTORNEY FOR A CRIMINAL DEFENDANT

SLEEPS THROUGH A SUBSTANTIAL PORTION OF THE TRIAL,

SUCH CONDUCT IS INHERENTLY PREJUDICIAL AND THUS NO

SEPARATE SHOWING OF PREJUDICE IS NECESSARY. SEE -

HOLLOWAY V. ARKANSAS 435 U. S. 475, 489-91, 98 S. CT. 1173, 1181-82,

55 L. ED. 2D 426 (1978); CF, RINKER V. COUNTY OF NAPA, 724 F. 2D 1352

AT 1354 (9TH CIR. 1983) PER CURIAM) JAVOR'S SIXTH AMENDMENT RIGHT TO

COUNSEL WAS VIOLATED NOT BECAUSE OF SPECIFIC

LEGAL ERRORS OR OMISSIONS INDICATING INCOMPETENCE BUT

BECAUSE HE HAD "NO" LEGAL ASSISTANCE DURING A SUBSTANTIAL

PORTION OF HIS TRIAL. THE MAGISTRATE'S FINDING OF NO ACTUAL

PREJUDICE IS NOT CONTROLLING BECAUSE REGARDLESS OF

COUNSEL'S PARTICIPATION WHEN PRESENT, WHEN A DEFENDANT IS

TRIED IN THE PARTIAL ABSENCE OF COUNSEL, HE IS PREJUDGED

AS A MATTER OF LAW E. d.

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2 ARGUMENT

3 SEE JAVOR V. UNITED STATES CITE AS 724 F.2d 831 (1984)
4 WHEN A DEFENDANT'S ATTORNEY IS ASLEEP DURING A SUBSTANTIAL
5 PORTION OF HIS TRIAL, THE DEFENDANT HAS NOT RECEIVED THE LEGAL
6 ASSISTANCE NECESSARY TO DEFEND HIS INTERESTS AT TRIAL.
7 IN JAVORS CASE, HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE
8 ASSISTANCE OF COUNSEL WAS VIOLATED IN THAT HE HAD "NO"
9 ASSISTANCE DURING A SUBSTANTIAL PORTION OF HIS TRIAL. AS THE COURT
10 REALIZED IN COOPER V. FITZHARRIS, 586 F.2d AT 1332 (QUOTING
11 HOLLOWAY V. ARKANSAS, 435 U.S. AT 490, 491, 98 S. CT. AT 1181, 1182) BY CONTRAST
12 WHEN THERE IS AN ABSENCE OF COUNSEL, THE EVIL LIES IN WHAT THE
13 ATTORNEY DOES NOT DO, AND IS EITHER NOT READILY APPARENT ON THE
14 RECORD, OR OCCURS AT A TIME WHEN NO RECORD IS MADE "ID (CITING
15 HOLLOWAY V. ARKANSAS, 435 U.S. AT 491, 98 S. CT AT 1182), AN INQUIRY INTO
16 THE QUESTION OF PREJUDICE WOULD REQUIRE "UNGUIDED SPECULATION"
17 AND WOULD NOT BE SUSCEPTIBLE TO INTELLIGENT EVEN HANDED
18 APPLICATION BECAUSE AN ATTORNEY'S ABSENCE PREJUDICES A
19 DEFENDANT MORE BY WHAT WAS NOT DONE THAN BY WHAT WAS DONE.
20 PREJUDICE IS INHERENT IN THIS CASE BECAUSE UNCONSCIOUS OR
21 SLEEPING COUNSEL IS EQUIVALENT TO NO COUNSEL AT ALL. THE
22 MERE PHYSICAL PRESENCE OF AN ATTORNEY DOES NOT FULFILL THE
23 SIXTH AMENDMENT ENTITLEMENT TO THE ASSISTANCE OF COUNSEL, HOLLOWAY
24 V. ARKANSAS, 435 U.S. AT 489, 98 S. CT AT 1181, PARTICULARLY WHEN THE CLIENT
25 CANNOT CONSULT WITH HIS OR HER ATTORNEY OR RECEIVE INFORMED
26 GUIDANCE FROM HIM OR HER DURING THE COURSE OF THE TRIAL. GEDERS
27 V. UNITED STATES 425 U.S. 80, 88-89, 96 S. CT. 1330, 1335-1336, 47 L. ED. 2d 592 (1976)
28 CRIMINAL LAW 641.13(1); CRIMINAL LAW 641.1

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3 SEE UNITED STATES V. CRONIC, 466 U.S., AT 659, AND N. 25, 104 S. CT., AT
4 2046-2047, AND N. 25. PREJUDICE IN THESE CIRCUMSTANCES IS
5 SO LIKELY THAT CASE-BY-CASE INQUIRY INTO PREJUDICE
6 IS NOT WORTH THE COST. 466 U.S., AT 659, 104 S. CT., AT 2047.
7 SEE JAVOR V. UNITED STATES, 724 F.2D 831, 834 (CA9 1984) ("PREJUDICE
8 IS INHERENT IN THIS CASE BECAUSE UNCONSCIOUS OR SLEEPING
9 COUNSEL IS EQUIVALENT TO NO COUNSEL AT ALL").

10 THE SIXTH AND FOURTEENTH AMENDMENTS GUARANTEE A PERSON
11 ACCUSED OF A CRIME THE RIGHT TO THE AID OF A LAWYER
12 IN PREPARING AND PRESENTING HIS DEFENSE. IT HAS
13 LONG BEEN SETTLED THAT "THE RIGHT TO COUNSEL IS
14 THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL".
15 MC MANN V. RICHARDSON, 397 U.S. 759, 771, N. 14 90 S. CT. 1441, N. 14,
16 25 L. ED. 2D 763 (1970). INDEED, COUNSEL'S INCOMPETENCE
17 CAN BE SO SERIOUS THAT IT RISES TO THE LEVEL OF A CONSTRUCTIVE
18 DENIAL OF COUNSEL WHICH CAN CONSTITUTE CONSTITUTIONAL ERROR
19 WITHOUT ANY SHOWING OF PREJUDICE. SEE CRONIC, 466 U.S. AT 659-660, 104
20 S. CT. AT 2047. SEE C.F. EG. MOORE V. U.S., 432 F.2D 730, 736 (CA3 1970) (DEFINING
21 THE CONSTITUTIONALLY REQUIRED LEVEL OF PERFORMANCE AS "THE EXERCISE
22 OF THE CUSTOMARY SKILL AND KNOWLEDGE WHICH NORMALLY PREVAILS
23 AT THE TIME AND PLACE"). THUS AN INQUIRY INTO A CLAIM OF HARMLESS
24 ERROR HERE WOULD REQUIRE, UNLIKE MOST CASES, UNBOUNDED SPECULATION".
25 HOLLOWAY V. ARKANSAS, 435 U.S. 475, 490-491, 98 S. CT. 1173, 1181-1182, 55 L. ED. 2D 426 (1978)
26 (EMPHASIS IN ORIGINAL). IF THE DEFENDANT CAN ESTABLISH A SIGNIFICANT CHANCE THAT
27 THE OUTCOME WOULD HAVE BEEN DIFFERENT, HE SURELY SHOULD BE ENTITLED TO
28 A REDETERMINATION OF HIS FATE. CP. U.S. V. AGURS, 427 U.S. 97, 121-122 96 S. CT. 2392, 2405-2406 49 L. ED. 2D
29 342 (1976) (MARSHALL J. D. DISSENTING.)

1. ARGUMENT-GENERALLY AN ATTORNEY AND CLIENT NEED TO CONFER ABOUT
2 THE TESTIMONY OR EVIDENCE ADDUCED AT TRIAL AND TOGETHER
3 EVALUATE IT'S IMPACT, GEDERS V. U.S. 425, U.S. AT 88, 96 S.C.T. AT 335;
4 PEOPLE V. ZAMMORA, 66 CAL APP.2d AT 234, 152 P.2d AT 214-15. MOREOVER
5 A TRIAL ATTORNEY MUST BE PRESENT AND ATTENTIVE IN ORDER TO
6 ADEQUATELY TEST THE CREDIBILITY OF WITNESSES ON CROSS-EXAM-
7 INATION A MATTER OF CONSTITUTIONAL IMPORTANCE, U.S. CONST. AMEND
8 VI (CONFRONTATION CLAUSE) SEE CHAMBERS V. MISSISSIPPI, 410 U.S. 284,
9 294-95, 93 S.C.T. 1038, 1045-46, 35 L.Ed.2d 297 (1973); U.S. V. TUCKER,
10 716 F.2d 576, 585-86 (9TH CIR. 1983); PEOPLE V. MANSON, 61 CAL APP.2d 102,
11 197-201, 132 CAL RPT. 265, 323-27 (1976) CERT. DENIED 430 U.S. 986, 97
12 S.C.T. 1686, 52 L.Ed.2d 382 (1977); WHITE V. STATE, 414 N.E.2d 973, 975-
13 76 (IND. APP. 1981). TODAY WE CONCLUDE THAT WHEN AN ATTORNEY FOR A
14 CRIMINAL DEFENDANT SLEEPS THROUGH A SUBSTANTIAL PORTION OF THE
15 TRIAL, SUCH CONDUCT IS INHERENTLY PREJUDICIAL AND THUS NO
16 SEPARATE SHOWING OF PREJUDICE IS NECESSARY. SEE HOLLOWAY V.
17 ARKANSAS, 435 U.S. 475, 489-91, 96 S.C.T. 1173, 1181, 82, 55 L.Ed.2d
18 426 (1978) CP RINKER V. COUNTY OF NAPA, 724 F.2d 1352 AT 1354 (9TH
19 CIR. 1983) PER CURIAM). FAVORS SIXTH AMENDMENT RIGHT TO COUNSEL
20 WAS VIOLATED NOT BECAUSE OF SPECIFIC LEGAL ERRORS OR OMISSIONS
21 INDICATING INCOMPETENCE, BUT BECAUSE HE HAD "NO" LEGAL
22 ASSISTANCE DURING A SUBSTANTIAL PORTION OF HIS TRIAL, WHEN
23 A DEFENDANT IS TRIED IN THE PARTIAL ABSENCE OF COUNSEL, HE
24 IS PREJUDICED AS A MATTER OF LAW.

ARGUMENT

AS QUOTED IN FARETTA V. CALIFORNIA SUPRA. CITE AS 95 S. CT. 2525 (1975) 2532,
422 U.S. 816 [2,3] THE SIXTH AMENDMENT INCLUDES A COMPACT STATEMENT
OF THE RIGHTS NECESSARY TO A FULL DEFENSE, "IN ALL CRIMINAL
PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT... TO BE INFORMED
OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED
WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR
OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF
COUNSEL FOR HIS DEFENCE." BECAUSE THESE RIGHTS ARE BASIC TO OUR
ADVERSARY SYSTEM OF CRIMINAL JUSTICE, THEY ARE PART OF THE "DUE PROCESS
OF LAW" THAT IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO DEFENDANTS
IN THE CRIMINAL COURTS OF THE STATES, THE RIGHT TO NOTICE,
CONFRONTATION, AND COMPULSORY PROCESS, WHEN TAKEN TOGETHER,
GUARANTEE THAT A CRIMINAL CHARGE MAY BE ANSWERED IN A MANNER
NOW CONSIDERED FUNDAMENTAL TO THE FAIR ADMINISTRATION OF
AMERICAN JUSTICE - THROUGH THE CALLING AND INTERROGATION OF
FAVORABLE WITNESSES, THE CROSS-EXAMINATION OF ADVERSE
WITNESSES, AND THE ORDERLY INTRODUCTION OF EVIDENCE. IN SHORT,
THE AMENDMENT CONSTITUTIONALIZES THE RIGHT IN AN ADVERSARY
CRIMINAL TRIAL TO MAKE A DEFENSE AS WE KNOW IT. SEE CALIFORNIA V.
GREEN, 399 U.S. 149, 176, 90 S. CT. 1930, 1944, 26 L. ED. 2D 489 (HARLAN, J. CONCURRING)
[4-6] THE SIXTH AMENDMENT DOES NOT PROVIDE MERELY THAT A DEFENSE
SHALL BE MADE FOR THE ACCUSED; IT GRANTS TO THE ACCUSED
PERSONALLY THE RIGHT TO MAKE HIS DEFENSE. IT IS THE ACCUSED, NOT
COUNSEL, WHO MUST BE "INFORMED OF THE NATURE AND CAUSE OF
THE ACCUSATION," WHO MUST BE CONFRONTED WITH THE WITNESSES
AGAINST HIM, AND WHO MUST BE ACCORDED "COMPULSORY PROCESS

1 FOR OBTAINING WITNESSES IN HIS FAVOR, "ALTHOUGH NOT STATED IN
2 THE AMENDMENT IN SO MANY WORDS, THE RIGHT TO SELF REPRESENTATION-
3 TO MAKE ONE'S OWN DEFENSE PERSONALLY- IS THUS NECESSARILY
4 IMPLIED BY THE STRUCTURE OF THE AMENDMENT, THE RIGHT TO DEFEND
5 IS GIVEN DIRECTLY TO THE ACCUSED, FOR IT IS HE WHO SUFFERS THE
6 CONSEQUENCES IF THE DEFENSE FAILS.

7 A PER SE REVERSAL OF PETITIONERS CONVICTION AND
8 SENTENCING, AS HE DID NOT RECEIVE THE ASSISTANCE OF
9 COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE
10 UNITED STATES AS IT INTENDED.